SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 1047

CHARLES M. THOMSON, AS TRUSTEE OF THE PROPERTY OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Appellant,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

STATEMENT AS TO JURISDICTION.

NYE F. MOREHOUSE,
P. F. GAULT,
Counsel for Appellant.

INDEX.

Subject Index.

Table of Cases Cited.

STATUTES CITED.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS.
EASTERN DIVISION.

Civil Action No. 4955

CHARLES M. THOMSON, AS TRUSTEE OF THE PROPERTY OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY, A CORPORATION,

Plaintiff-Appellant,

vs.

THE UNITED STATES OF AMERICA AND INTERTERSTATE COMMERCE COMMISSION,

Defendants-Appellees.

JURISDICTIONAL STATEMENT.

This is a direct appeal from a final decree entered without written opinion by a specially constituted three-judge United States district court dismissing appellant's petition to set aside an order of the Interstate Commerce Commission (31 M. C. C. 299) denying appellant's application under the so-called "grandfather clause" of section 206 (a) and under section 207 (a) of Motor Carrier Act, 1935 (49 Stat. 543, 551; 49 U. S. C., sec. 306 (a) and 307 (a)), for operating authority as a common carrier by motor vehicle.

The three-judge district court was convened pursuant to the Urgent Deficiencies Act of 1913 (38 Stat. 219-220, 28 U. S. C., sec. 41 (28), 43-48, 45a, and 47 (a)) and section 205 (h) of the Motor Carrier Act, 1935 (49 Stat. 550), rearranged by the Transportation Act of 1940 (54 Stat. 922)

as section 205 (g) of Part II of the Interstate Commerce Act, which now includes Motor Carrier Act, 1935 (54 Stat. 919; 49 U. S. C., sec. 305 (g)).

(a) Statutory provisions believed to sustain jurisdiction in this Court on appeal to review the judgment of the district court are the above mentioned provisions of the Urgent Deficiencies Act of 1913, particularly (28 U. S. C. sec. 47 and 47a) and section 238 of the Judicial Code as amended (28 U. S. C. sec. 345).

(b) This appeal involves the construction and application of the so-called "grandfather" clause of section 206 (49 Stat. 551) and also section 207 (49 Stat. 551-552) of the Motor Carrier Act, 1935, relating to applications for certificates of convenience and necessity. The two sections just cited are respectively 306 and 307 of Title 49, U. S. Code, but for convenience will be referred to as sections 206 and 207, since the reports of the Commission and the decisions of the courts commonly use that reference.

The material provisions of sections 206 and 207 are as follows:

> "Sec. 206 (a) Except as otherwise provided in this section * * *, *no common carrier by motor vehicle subject to the provisions of this part shall engage in any* interstate or foreign *operation on any public highway,* * * * unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: Provided, however, That, * * * if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, * * * the Commission shall issue such certificate without requiring further proof that

public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, * * *. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful. * * *"

"Sec. 207 (a) * * * a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: * * *"

Also involved in this appeal is the construction and application of section 203 (a) (14) of the Motor Carrier Act, 1935 (49 Stat. 544; 49 U. S. C. sec. 303 (a) (14)), providing:

"The term 'common carrier by motor vehicle' means any person who or which undertakes, whether directly or by a lease or any other arrangement, to transport passengers or property, or any class or classes of property, for the general public in interstate or foreign commerce by motor vehicle for compensation, whether over regular or irregular routes, including such motor vehicle operations of carriers by rail or water, and of express or forwarding companies, except to the extent that these operations are subject to the provisions of part I."

(c) The date of the judgment and decree sought to be reviewed is March 19, 1943, and the application for appeal is presented on April 15, 1943.

This appeal presents novel and important questions of law [1] arising out of the construction and application of the Motor Carrier Act, 1935, particularly sections 203 (a) (14), 206, and 207. The due process clause of the Fifth Amendment to the Constitution of the United States is also involved. That this Court has jurisdiction is established by a long line of cases decided by this Court, among which are the following: *United States* v. *Maher*, 307 U. S. 148; *Alton R. Co.* v. *United States*, 315 U. S. 15; *U. S.* v. *Carolina Carriers Corp.*, 315 U. S. 475; *Howard Hall Co.* v. *U. S.*, 315 U. S. 495; *U. S.* v. *Rosenblum Truck Lines*, 315 U. S. 50; *Lubetich* v. *United States*, 315 U. S. 57; *Gregg Cartage Co.* v. *U. S.*, 316 U. S. 74.

This appeal presents only questions of law. The evidence of record is undisputed and uncontradicted. This is the first case to come before the Supreme Court wherein a long-established common carrier by rail asserts operating rights on traffic transported between certain of its freight stations by motor vehicle as an auxiliary or supplement to rail service at rates and charges named in its tariffs duly published and filed with the Interstate Commerce Commission, with specific provision authorizing movement of such traffic over part of its routing by motor vehicles operated on the highways. That the construction and application of the Motor Carrier Act, 1935, is for the courts having jurisdiction is established by decisions of the Supreme Court cited in the immediately preceding paragraph. Other authorities supporting the principle that the Commission's

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[1] The district court specifically so found and held in order of March 29, 1943, copy attached, staying enforcement of the Commission's order and of its judgment pending appeal.

views on questions of law are not binding upon the courts are cited in the margin.[2]

Appellant, as Trustee, administers and operates a property referred to herein as the Railway Company, which for nearly a hundred years has been and presently is serving the public as a common carrier by railroad. The motor carrier operations, on the basis of which appellant asserts his claim of right to a certificate, were started by appellant's predecessor in interest, the Railway Company, prior to the so-called grandfather or critical date of June 1, 1935—some as early as 1931—and have been carried on continuously up to and including the present.

In all material respects the method of operation at present is the same as when the service was first instituted. and consequently reference herein to the present includes the method of operation prior to the critical date of June 1, 1935. Freight, consisting of less-than-carload traffic commonly known as merchandise traffic, instead of moving throughout the entire course of transportation in box cars over appellant's railroad tracks, is transported over a part of its routing between stations of the appellant and over highways generally closely adjacent to appellant's rail lines.

This freight is handled on railroad billing and charges are assessed in accordance with tariff schedules duly published and filed by appellant with the Commission. These tariffs contain provisions specifically authorizing either the

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[2] *Great Northern Ry.* v. *Delmar Co.*, 283 U. S. 686. *Atchison etc. Ry. Co.* v. *United States*, 284 U. S. 248. *Chicago, R. I. & P. Ry Co.* v. *U. S.*, 284 U. S. 80, 100. *Ann Arbor R. Co.* v. *United States*, 281 U. S. 658. *St. L. & O'Fallon R. Co.* v. *U. S.*, 279 U. S. 461. *Alton R. Co.* v. *United States*, 287 U. S. 593. *Interstate Commerce Com.* v. *Oregon-Wash. R. & Nav. Co.*, 288 U. S. 14. *U. S.* v. *N. Y. Central R. R.*, 263, U. S. 603. *Texas & Pac. Ry.* v. *Gulf, Etc. Ry.*, 270 U. S. 266. *United States* v. *Idaho*, 298 U. S. 105. *Powell* v. *United States*, 300 U. S. 276. *Arizona Grocery* v. *Atchison Railway*, 284 U. S. 370.

originating or delivering railroad, at its option, to substitute highway vehicle service for available rail service between stations on its line, subject to the same charges as stated in the tariffs for all-rail service. Appellant assumes and retains full responsibility for such freight, as a common carrier thereof, throughout the entire course of its transportation both by rail and by highway.

This plan of operation provides service which is recognized as auxiliary of or supplemental to railroad service, thus producing a new type of common-carrier service utilizing both forms of transportation to advantage and differing from service given by a railroad alone or by a motor carrier alone.

Pursuant to this plan, appellant's predecessor Railway Company entered into arrangements evidenced by written contracts or agreements with certain possessors of motor-vehicle equipment and personnel referred to as contractors, under which the contractors agreed to furnish such motor trucks of types satisfactory to the Railway Company and employes to drive them as might be required by the Railway Company to move freight in its possession as a common carrier between its freight stations in accordance with schedules and instructions to be given by it.

The contractors had and have no contractual arrangements of any kind with shippers or receivers of the freight. Hence they were and are not common carriers in respect of this freight. The Railway Company formerly, and now appellant, have at all times received, transported, and delivered the freight as a common carrier and stood in that relation to the shippers and receivers throughout the entire transaction from the receipt of the freight from the consignor to ultimate delivery to the consignee.

The Railway Company had and appellant has under these arrangements direct and complete control of the movement

and handling of the freight, which was and is exclusively between appellant's freight stations. The Railway Company and appellant fixed the schedules for highway movement to coordinate with rail schedules, designated the amount and particular shipments of freight to be moved, and the contractors were and are obliged to conform to such changes as made from time to time by the Railway Company and appellant. No billing of any kind was or is issued by the contractors.

The Commission in its report and order entered under date of November 26, 1941 (Docket MC 42614, 31 M. C. C. 299), summarily disposed of appellant's asserted grandfather rights in two paragraphs on page 301 of the report, wherein it ignored and misconstrued the undisputed evidence of record, referred to and based its report on matters not introduced in evidence, and arbitrarily discarded the legislative standards and directions prescribed by the Congress in Motor Carrier Act, 1935, particularly sections 203 (14), 206 and 207.

The report of the Commission, which was entered by Division 5, was not unanimous. Of the three Commissioners participating the senior Commissioner, Mr. Eastman, now Director of the Office of Defense Transportation, in a separate expression stated that the grandfather application should be granted rather than denied. Commissioner Eastman referred to *Missouri Pac. R. Co. Common Carrier Application*, 22 M. C. C. 321, 333, wherein, concurring in part, he expressed the opinion that under the legislative definition of a common carrier stated in section 203 (a)(14) of the act the rail carrier, in circumstances substantially identical with those indisputably shown below with respect to appellant's motor vehicle service, was a common carrier by motor vehicle and entitled to receive a grandfather certificate as such.

The Commission's report and order here involved is in direct and irreconcilable conflict with its later decision (by Division 5) in *Crooks Terminal Warehouse, Inc., Contract Carrier Application* (34 M. C. C. 679), where a certificate was granted to the Trustees of the Chicago, Rock Island and Pacific Railway Company covering auxiliary and supplementary motor vehicle operations through contracts and under circumstances in all other material respects identical with those surrounding appellant's operations as indisputably shown by the evidence before both the Commission and the court below. The full Commission later approved that decision of Division 5 by denying a petition for reconsideration thereof (Feb. 1, 1943; not officially reported).

The Commission's decision here under review is also in direct conflict with the later decision of the full Commission in *Boston & Maine Transportation Company Common Carrier Application*, 34 M. C. C. 599, wherein substantially identical contracts with the truckers who furnished the motor vehicles were involved. The decision is also in conflict with fundamental principles and conclusions stated and followed by it in other cases, which will be shown on brief and argument herein.

The Commission's decision and the judgment of the District Court are, moreover, quite incompatible with the liberal construction placed upon the grandfather clause by decisions of the Supreme Court and its admonition as to the necessity for effectuating the purpose of the Transportation Act "to coordinate the various transportation agencies which constitute our national transportation system." *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 481; *Alton R. Co.* v. *United States*, 315 U. S. 15, 20-21. Furthermore, the decision and judgment are clearly in conflict with the construction and application given the grandfather clause in *United States* v. *Rosenblum Truck Lines*, 315 U. S. 50, under closely analogous facts. In that decision the con-

tractors (truck owners and operators) were held to be the "instruments performing part of the common carrier service" of those with whom they had contracted to furnish vehicles and drivers. The common carriers (like appellant here) who had solicited and contracted with the shippers for the movement of the freight were held presumptively entitled to the grandfather rights since they "offered the complete transportation service to the general public and the shipper" (pp. 53-4). The truck owners were denied grandfather rights.

The Commission's report and order in addition to being arbitrary, to giving effect to extraneous matters not found of record, and to ignoring legislative standards prescribed by the Congress and the undisputed evidence of record, lacked essential basic findings of fact and gave no effect to the legislative history of the act demonstrating that by official reports of the Commission the Congress prior to passage of the act was fully advised that there was a practice on the part of several railroads to handle freight in the manner theretofore adopted by appellant's predecessor by making use of motor truck equipment furnished by others, and consequently this plan of operation must have been in contemplation by Congress in enacting the grandfather provisions of the act.

The Commission, moreover, arbitrarily failed to consider or give any legal effect to the uncontradicted evidence justifying the granting of the application under sections 206 and 207 of the act independent of the grandfather clause, notwithstanding the fact that these sections of the statute direct the Commission so to do where it fails to issue a grandfather certificate and in this instance its order setting the case for hearing and notifying applicant and the public thereof specifically stated that in the event the evidence indicated that applicant was entitled to receive a form of

authority other than that applied for such other form of authority would be granted.

The theory and reasoning which serve as a basis for the report and order of the Commission, if correct, would demonstrate that the form of transportation here involved is outside the scope of and not regulated by the Motor Carrier Act, 1935. That act did not purport to regulate all forms of transportation of freight by motor vehicle. The only operations subjected to regulation were those of common carriers (sec. 206, 207, and 208), contract carriers (sec. 209), and what are referred to as brokers (sec. 211). Private carriers were not regulated and no authority is necessary to transport freight in interstate commerce as a private carrier.

If, as the Commission has found with the concurrence of the district court, appellant was not a common carrier within the meaning of the act as to this transportation, it would follow that the contractors furnishing the equipment were likewise not common carriers, since they had no contractual relations of any kind with the shippers in respect of this traffic and consequently this highway movement of freight between appellant's freight stations incidental to the operations of the railroad property must then be regarded as private carriage for which no operating authority would be required.

The district court rendered no written opinion. Its judgment and decree of March 19, 1943, are based upon a finding that there is substantial evidence in the record of the Commission to support the findings and conclusions stated in the report and order of November 26, 1941, and upon conclusions of law in substance that appellant's predecessor in interest was not a common carrier by motor vehicle on or prior to the critical date. The Court in its decision, in effect, followed and adopted the conclusions of the Commis-

sion, including all the errors of fact and law found in the Commission's report and order of November 26, 1941.

Upon the foregoing statement and authorities we respectfully submit that the nature of the case presented by this appeal is such as to bring it clearly within the jurisdiction of the Supreme Court and the questions involved as to appellant's right to a grandfather certificate are substantial. They are also of great public importance, involving as they do the effectuation of the Congressional purposes to promote coordinated transportation service and permit the shipping public to continue realizing the benefits from such coordinated operations as were in existence when the Motor Carrier Act was adopted.

Respectfully submitted,

NYE F. MOREHOUSE,
P. F. GAULT,
Attorneys for Plaintiff-Appellant.

April 15, 1943.

(Order March 29, 1943 attached—not copied.)

APPENDIX "A".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

Civil Action File No. 4955

CHARLES M. THOMSON, as Trustee of the Property of Chicago and North Western Railway Company, a Corporation, *Plaintiff*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*.

Findings of Fact and Conclusions of Law.

The above cause of action came on for hearing before a duly constituted three-judge court on January 28, 1943, and was submitted upon the pleadings, records of the Interstate Commerce Commission as offered in evidence, arguments and briefs of the parties thereto. The court enters its findings of fact and conclusions of law as follows:

FINDINGS OF FACT.

1. The records of the Interstate Commerce Commission were offered in evidence, and are before the court.

2. Plaintiff filed application with the Interstate Commerce Commission, on February 11, 1936, for a certificate of public convenience and necessity, under the "grandfather" provisions of Section 206(a) of the Motor Carrier Act of 1935, (U. S. C. Title 49 Sect. 306) seeking authority, as a common carrier by motor vehicle, to transport freight, passengers, baggage, and mail, between named points over designated routes, an operation then conducted through the use of vehicles provided by independent motor carriers under written contract. Later application of plaintiff for certificates as a common carrier by motor vehicle, under Section 207(a) of the Motor Carrier Act of 1935, (U. S. C. Title 49 Sect. 307) were filed by plaintiff and granted by

the Interstate Commerce Commission, and although considered in the Report and Order entered November 26, 1941, here subject to review, such applications are not involved in this action and need not here be considered. Hearings were held on March 28, 1938, and thereafter on November 26, 1941, the Interstate Commerce Commission, by and through Division 5, entered its report and order, (Ex. A to Answer of Commission), denying application of plaintiff as filed February 11, 1936. The Interstate Commerce Commission, as a whole, denied plaintiff's petition for reconsideration and rehearing on November 2, 1942, effective January 1, 1943, the effective date being thereafter extended, by the Commission, to April 1, 1943.

3. There is substantial evidence in the Record of the Interstate Commerce Commission, to support the findings and conclusions as stated in the Report and Order, entered November 26, 1941, (Exhibit A to Commission Answer) which said Report and Order are hereby adopted and made a part of these Findings of Fact, by reference.

Conclusions of Law.

1. The Court has jurisdiction of the action herein, and of the parties thereto.

2. Operations which entitle an applicant to a "grandfather" certificate, as a common carrier by motor vehicle, under provisions of Section 206(a) of the Motor Carrier Act of 1935, (U. S. C. Title 49 Sect. 306) are "bona fide operations" engaged in on June 1, 1935, and since that time, over which applicant exercised direction and control, and for which applicant assumed responsibility to the public, both as to cargo and as to public liability and property damage resulting from operation of motor vehicles over highways.

3. The Report and Order of the Interstate Commerce Commission, entered November 26, 1941, is lawful and within statutory authority of this Commission.

4. The Report and Order of the Interstate Commerce Commission, entered November 21, 1941, is supported by substantial evidence, in the Commission record.

5. Plaintiff was given a full and fair hearing by the Interstate Commerce Commission, upon its application, and in connection with the Report and Order, entered November 21, 1941.

6. No constitutional right of plaintiff has been violated by the Report and Order of the Interstate Commerce Commission, entered November 21, 1941, and plaintiff has suffered no damage by reason thereof.

7. The complaint herein is without merit, and should be dismissed at the cost of plaintiff.

J. EARL MAJOR,
Judge of the 7th Circuit Court of Appeals.
WILLIAM H. HOLLY,
United States District Judge.
PHILIP L. SULLIVAN,
United States District Judge.

ORDER OF THE COURT.

The above-entitled cause came on for hearing on January 28, 1943, plaintiff and defendants being represented by counsel, and being submitted upon the pleadings, oral argument and briefs of counsel, and the court having entered its findings of fact and conclusions of law deciding that the complaint herein should be dismissed.

It Is Therefore Ordered and Adjudged, That the complaint herein be, and the same is hereby dismissed, at the cost of plaintiffs.

This, the 19th day of March, 1943.

J. EARL MAJOR,
Judge of the 7th Circuit Court of Appeals.
WILLIAM H. HOLLY,
United States District Judge.
PHILIP L. SULLIVAN,
United States District Judge.

APPENDIX "B".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

Civil Action No. 4955.

CHARLES M. THOMSON, as Trustee of the Property of Chicago and North Western Railway Company, a Corporation, *Plaintiff*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*.

Order.

This matter coming on for hearing on timely motion of plaintiff for amended and additional findings of fact and amendment of the decree and judgment entered herein under date of March 19, 1943, and counsel for defendants having advised the Court that they do not object, the Court finds:

1. The questions of law involved in this case are novel and important as to which there is a reasonable doubt.

2. Immediate enforcement of the order of the Interstate Commerce Commission under review herein would result in a serious and unnecessary disturbance of the course of business, affecting not alone the parties to this litigation but the public now enjoying this form of transportation.

3. The public interest would not be adversely affected, but, on the contrary, would be preserved by maintaining the *status quo* pending appeal and disposition of this cause by the Supreme Court of the United States.

It Is Ordered:

That enforcement of the Interstate Commerce Commission's order of November 26, 1941, in Docket MC 42614 effective as amended April 1, 1942, and enforcement of this Court's decree and judgment of March 19, 1943, be and the

same hereby are suspended and stayed pending appeal to the Supreme Court of the United States and final disposition of the cause by that Court; and the findings and judgment of the Court are amended accordingly.

Enter:

J. Earl Major,
Circuit Judge.
William H. Holly,
District Judge.
Philip L. Sullivan,
District Judge.

Dated: March 29, 1943.

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